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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 260

DORIS NYYSSONEN, Administratrix of the Estate of Einard Nyyssonen, Deceased,

Petitioner,

vs.

BENDIX CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF

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Introduction

After eighteen years* of an up-hill fight, the widow of a lone inventor, who made several important inventions having considerable military value (P. 6, lines 7-6 from the bottom), has now appeared here to ask that she be accorded the day in court that she and her deceased inventor husband have been denied in both the District Court and the Court of Appeals.

*On p. 3 of its brief, the respondent admits that its own infringement activities alone account for at least six of those eighteen years.

Though the Patent Office had no difficulty understanding the inventions (P. 7, line 7), the District Court and the Court of Appeals say that they do not have sufficient technical training to enable them also to obtain such understanding. They have accordingly abdicated in favor of the opposing party's admittedly biased* expert witness, assumed belatedly to have been "named" master (P. 10, line 9).

Judge Irving R. Kaufman, "Masters In The Federal Courts: Rule 53", 58 Col. L. Rev. 452, 453, warned against this very abdication:

> "The chief factor militating against unrestricted references in the federal courts is the possibility that it may result in an abdication of the judicial function, exclusively reserved by the Constitution to the federal judiciary."

Very few, if any, judges have technical training, but, as explained in the last paragraph on page 15 of the Petition, with the exception of the judges in the First Circuit, they all seem to be able to find it possible to obtain an understanding of the patent cases before them, merely by listening to oral argument, and sufficient oral argument.

This Court knows (P. 16, first paragraph) the value of oral argument.

The District Court and the Court of Appeals have justified their abdication upon the gratuitous, but mistaken, assumption (P. 13, last complete paragraph) that the decision of the case depends upon "the relative credibility of opposing expert witnesses". In actual fact, however, their abdication has been based rather upon the

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*A "natural bias" arising out of "his long term association with defendant" (R. 953), under an "annual contract * * * since approximately 1950" (R. 605).

"relative credibility" of the *same* respondent's biased expert witness, on direct and cross-examination (P., top of p. 12). Both courts based their decisions on this biased expert witness' testimony on direct examination only, completely ignoring his entirely contrary testimony on cross-examination.

Question I

Relating to the Complete-Combination Claims 1 and 10 of the 098 Patent

The respondent does not controvert the petitioner's statement (P. 12, second complete paragraph) that the sole point of dispute between the parties with respect to the issue raised by Question I relates to the correct interpretation of the meaning of the two simple non-technical English words "may be", appearing in a particular passage of the patent specification, quoted on page 11 of the Petition.

On *direct examination,* the respondent's expert witness testified that those two words "may be" could have only the one meaning of "shall be" or "must be" (P., bottom of p. 11); under which interpretation, the District Court and the Court of Appeals held that the conclusion of non-infringement follows.

On *cross-examination,* however (P. 12, first complete paragraph), that same expert witness was compelled to admit that those two words "may be" are not really restricted to the interpretation "shall be" or "must be", but that they could also be interpreted to mean just exactly what they say, namely, "*may* be"; under which interpretation, the conclusion of infringement would follow.

Quite true, as the respondent argues (page 7, lines 5-3 from the bottom of its brief),* the respondent's expert wit-

*This argument of the respondent is considered more fully in Appendix F, *infra*, p. 21a.

ness, being admittedly biased, volunteered the statement (his exact testimony appears at P. 19a) that he personally does "not subscribe to" the latter interpretation. He prefers an interpretation from which the conclusion of non-infringement would follow.

This testimony of the respondent's biased expert witness, as to what he personally does "not subscribe to", did not, however, relate to facts (P. 12, next-to-the-last paragraph). It was precisely the kind of testimony that Judge Learned Hand described as "burdensome inpertinence", and that many other judges have described as objectionable "conclusory testimony" (P. 12).

Since it requires neither technical training nor expert testimony to interpret the meaning of those two simple non-technical English words "may be", it was the duty of both the District Court and the Court of Appeals themselves to interpret that meaning, and not to delegate (P. 14, last complete paragraph) that duty to that opposing admittedly biased expert witness.

This duty both the District Court and the Court of Appeals could readily have performed if they had been willing to listen to oral argument, and sufficient oral argument.

To summarize the issue raised by Question I:

Neither the District Court nor the Court of Appeals has decided this case. It has been decided by the admittedly biased expert witness for the respondent, upon the basis of his "burdensome-impertinence", "conclusory testimony" that the two simple non-technical English words "may be" should be construed to mean "shall be" or "must be", and that he does "not subscribe to" assigning to these two words the meaning that they actually do express, namely, "may be".

Addendum Relating to Question I

On page 8 of the respondent's brief, purporting to deal with Questions II and VI, the misstatement is made that, though the petitioner was, indeed, limited by way of oral argument, there was no such limitation by way of argument in writing.

This matter has no bearing whatever upon Questions II and VI, but it may perhaps have some bearing upon Question I. It is demonstrated by Appendix G, p. 22a, *infra,* that the petitioner was very severely limited, by way of argument in writing, both in the District Court and the Court of Appeals.

Questions II and III

Questions II and III relate to issues as to both of which, by the appeal, the petitioner sought, but did not obtain from the Court of Appeals, either an affirmance or a disaffirmance of the decision of the District Court (P. 9, lines 11-16 and 19).

The respondent's brief does not say that the petitioner did receive either such affirmance or disaffirmance.

Question II

Relating to the Sub-Combination Claim 1 of the 131 Patent

At the very top of page 2 of its brief, the respondent makes the misstatement that the petitioner is asking "this Court to review the concurrent holdings of the courts below".

There was no concurrent holding, however, with respect to claim 1 of the 131 patent. The Court of Appeals decided the issue of infringement of claim 1 of the 131

patent upon no ground at all (P. 9, lines 11-16), and certainly not upon the ground of decision of the District Court.

Contrary to its present argument, at the bottom of p. 8 and the top of p. 9 of its brief, the respondent so admitted in the Court of Appeals (P. 9, lines 4-5; R. 1172, second paragraph):

> "Defendant-appellee *agrees with plaintiff* that this Court's discussion of non-infringement * * * *does not apply* so directly to the language of claim 1 of the 131 patent, which omits the term 'stationary'" (italics supplied).

Question III

Relating to the Cloud Unnecessarily Cast by the Volunteered Statement of the Court of Appeals That "We Think It Clear That" the Sub-Combination Claim 1 of the 131 Patent Is Invalid, for Double Patenting

In the case of Question III, just as in the case of Question II, the respondent goes off on a tangent, without reaching the issue raised.

As in the case of Question II, again, however, the respondent changes its argument in this Court. In the Court of Appeals, the respondent several times urged that the issue of double patenting ought to be decided (R. 1174, last two lines; 1178, line 3).

The respondent appears not to dispute that neither lack of technical training nor expert testimony could stand in the way of deciding the purely legal question of double patenting (P. 13).

The Court of Appeals, without due process, has taken away the petitioner's property right in the presumption of

validity that was conferred upon claim 1 of the 131 patent by 35 U.S.C., Section 282:

"A patent shall be presumed valid".

Question IV

Relating to the Scope of Rule 52(a) of the Federal Rules of Civil Procedure

The respondent's arguments on pp. 11-12 of its brief are answered in Appendix H, p. 23a, *infra.*

Question IV, however, relates to something entirely different, namely, the scope of review, by the Court of Appeals, under the provisions of Rule 52(a).

It has been proved (P., at the middle of page 10), without denial by the respondent, and it is again proved by the Petitioner's Exhibit III, the "Affidavit of David Rines" accompanying the "Petitioner's Motion For Leave To Supplement The Record", that the District Court did not examine the record as a whole, including the cross-examination of the respondent's expert witness, but merely adopted the respondent's proposed Findings of Fact based on that expert witness' testimony on direct examination only.

Question IV inquires whether the Court of Appeals was correct in approving this action of the District Court, without itself examining the record as a whole.

As explained at the top of p. 14 of the Petition, the Court of Appeals, by thus rejecting the petitioner's contention that this is not the kind of case in which the "clearly erroneous" principle of Rule 52(a) applies (P. 5a, line 3; 11a, lines 5 and 15), has placed itself in conflict with this Court's ruling in *United States* v. *El Paso Natural Gas Company,* 1964, 376 U.S. 651, 656-657 and note 4, and also with the Court of Appeals for the Fifth Circuit, *Louis Dreyfus*

et Cie. v. *Panama Canal Company,* 1962, 5 Cir., 298 F.2d 733, 738. Since the filing of the petition, three further decisions in conflict with the Court of Appeals for the First Circuit have been published:

Featherstone v. *Barash,* 1965, 10 Cir., 345 F.2d 246, 249.

Roberts v. *Ross, Jr.,* 1965, 3 Cir., 344 F.2d 747, 751-752.

M. B. Skinner Company v. *Continental Industries, Inc.,* 1965, 10 Cir., 346 F.2d 170, 173.

These are all in accord with the practice in the Second Circuit:

Rooted Hair, Inc. v. *Ideal Toy Corp.,* 1964, 329 F.2d 761, 769 (concurring opinion).

Question V

Relating to Rule 77(b) of the Federal Rules of Civil Procedure

Question V, which is treated on p. 14 of the Petition, presents an issue as to the proper interpretation of another of the Federal Rules of Civil Procedure, Rule 77(b). The District Court belatedly "named" (P. 10, line 9) the respondent's expert witness as "master", without even safeguarding the rights that the petitioner would have had before a properly appointed master (R. 1017).

Pages 12-13 of the respondent's brief do not deal with this Question V at all.

Question VI

Relating to Due Process

Though the petitioner's complaint that she has been denied due process is not limited to Question VI, this Question VI inquires specifically whether she has been given, by the Court of Appeals, the kind of hearing to which

she was entitled on her appeal relating to the denial, "on their merits", of her motions under Rules 52(b) and 59(a), without the District Court hearing argument, either orally, by brief, or in any other way (P. 10, last 2 lines; 11, line 1).

The argument in the first complete paragraph on page 9 of the respondent's brief is refuted by the top of page 15 of the Petition. That argument is not supported by the judgment (R. 1128, last 3 lines, 1129).

Reasons for Granting the Writ

Pages 13-15 of the respondent's brief provide no answer to the Reasons A to F for granting the writ, given on pages 15-18 of the Petition.

On page 13, for example, the respondent dismisses Reason B for granting the writ (P. 16-17) as a *non sequitur.*

In "Inventors Past and Present", 39 Reviews of Economics and Statistics, No. 5, August, 1957, p. 321, Jacob Schmookler, though refuting the belief that "the independent inventor is dead and buried", neverthless warned that there is danger that

> "potential independent inventors will be dissuaded from inventing and thereby help make true what had only been believed to be true all along".

This very inventor became dissuaded from making any more inventions, and even those additional inventions that he did make died with him (R. 1160).

Conclusion

It would appear to be the duty of this Court either to restore to the petitioner the kind of trial to which she is entitled, or, if the Court should decide finally that that can not be done, to inform Congress that the federal judicial

system has broken down, and that new legislation is necessary in order to assure to litigants their Constitutional right to a fair trial in the federal courts.

It is respectfully submitted, therefore, that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX F

The Respondent's Argument As to How to Interpret Its Expert Witness' Testimony on Cross-Examination.

(Page 3, footnote, *supra*)

On page 7 of its brief, the respondent argues that the cross-examination testimony of its expert witness (quoted at P. 19a) should be interpreted to mean:

> "Well, you, Mr. Rines (counsel for plaintiff), may stretch it by choosing to interpret it that way, but it is wrong to do so".

The petitioner does not agree with that interpretation. The cross-examination consisted of three questions and three answers. The first answer was:

> "Well, you may interpret it that way";

the second answer was:

> "It is true in that interpretation, but I do not subscribe to the interpretation";

and the third answer, in response to the question:

> "But it is true with respect to that interpretation?"

was the outright, unqualified answer:

> "That's right."

There is no testimony here relating to either a "stretched" interpretation, or that "it is wrong to do so". The testimony is merely that there are two permissible interpretations, but that the witness personally chose to "not subscribe to" one of them.

In any event, however, who conferred upon this opposing admittedly biased expert fact witness the judicial function of deciding the meaning of the two simple non-technical English words "may be"? Judge Learned Hand, as before stated, p. 4, *supra*, pronounced such testimony as constituting only "burdensome impertinence".

APPENDIX G

The Limitation of Written Argument in Both the District Court and the Court of Appeals

(Page 5, *supra*)

The District Court limited the briefs to only forty pages (R. 680); and, as stated at the bottom of page 10 of the Petition, the District Court did not provide for an opportunity even to criticize the proposed Findings of Fact, whether orally or in writing.

In the Court of Appeals, the petitioner requested leave to file a brief containing 300 pages (Petitioner's Exhibit I, accompanying the "Petitioner's Motion For Leave To Supplement The Record"). The petitioner explained to the Court of Appeals, in great detail, why 300 pages were needed, "based upon * * * the plaintiff's brief as so far drafted", and expressed the "fear" that a smaller brief "would detract from the Court's understanding of the case" (concluding paragraph). The Court of Appeals, however, without giving any reason therefor, refused to permit the filing of a brief containing in excess of only 150 pages.

The Court of Appeals later realized fully the soundness of the petitioner's "fear" that 150 pages would not be sufficient for it to obtain a proper "understanding of the case", and it realized that it could obtain a better understanding through the medium of additional oral argument or additional briefs (R. 1128, P. 12a). It refused, however, to receive either (P. 11, the first complete paragraph), though the petitioner offered to supply both (R. 1139-1140, 1167, 1168).

On page 4 of its brief, the respondent says that the plaintiff filed a reply brief, in the Court of Appeals, of 25 printed pages. It neglected to explain, however, that this was the limit of the number of pages that the court rules

permitted (see the concluding paragraph of the Petitioner's Exhibit III, the "Affidavit of David Rines", annexed to the said "Petitioner's Motion For Leave To Supplement The Record").

APPENDIX H

"Original Thought or Expression"

(Page 7, *supra*)

In lines 3-2 from the bottom of page 11, the respondent attempts to justify the District Court's giving the petitioner "less" than its "original thought or expression" (the exact language of the District Court appears on p. 10 of the Petition).

The District Court itself seems not to have shared the respondent's attempted justification, else it would not have admitted that (R. 1027):

> "It is no service to the integrity of the process of justice or the development of the law for a judge to pretend otherwise".

At the bottom of page 4, the respondent says also that the District Court did not adopt the defendant's findings "entirely or verbatim". The District Court itself admitted, however (R. 953), that

> "My own findings of fact are in most respects verbatim copies of this draft"

prepared by the respondent.

There are two matters here to consider: first, "original thought"; and, secondly, "original expression".

All the "original thought" that the District Court gave to the case, as the respondent's brief, p. 5, line 3, admits, was merely its "*meticulous check* of the record itself" (italics

supplied); referring to that part only of the record that was contained in the respondent's citations to its Proposed Findings of Fact. Those citations, however, related to the *direct examination only* of the respondent's expert witness; they did not include that same expert witness' *cross-examination.*

The respondent's brief does not dispute the petitioner's statement to that effect (P. 13, last 3 lines), but this is proved also by the said Petitioner's Exhibit III, "Affidavit of David Rines".

The Court of Appeals likewise gave "less" than its "original thought". As appears from its own quotation (R. 1126, P. 10a) and the said Petitioner's Exhibit III, "Affidavit of David Rines," it, too, relied upon the respondent's expert witness' testimony on *direct examination* only. It did not quote or rely upon the same expert witness' testimony *on cross-examination* (P. 12).

The record gives a very clear answer, therefore, to the respondent's query, page 12 of its brief, as to "How petitioner could know the private acts of the court during formulation of the decision".

So much for the matter of "original thought".

The petitioner was entitled also, however, to the "original expression" of both the District Court and the Court of Appeals.

In *United States* v. *Forness*, 1942, 2 Cir., 125 F.2d 928, 942-943, certiorari denied, 316 U.S. 694, Judge Jerome Frank, speaking for the Court of Appeals for the Second Circuit, remarked:

> "The trial court is the most important agency of the judicial branch of the government, precisely because on it rests the responsibility of ascertaining the facts.

> * * * And it is not a light responsibility * * *. To ascertain the facts is not a mechanical act. * * * It involves skill and judgment * * * every effort should be made to render it as adequate as it humanly can be".

Almost the identical words were recently used in *Featherstone* v. *Barash*, 1965, 10 Cir., 345 F.2d 246, 249, *supra*, p. 8.

Judge Frank said further, at p. 942:

> "The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards".

He said also that one of the purposes of having the trial judges find the facts is

> "that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper".

Seven years later, Judge Frank amplified his views in "Courts On Trial", 1949, pages 183, 185. After repeating the last quoted passage, Judge Frank continued:

> "A trial judge, every now and then, thus discovering that his initially contemplated decision will not jell, is obliged to decide otherwise. * * * That a trial judge should make special findings of fact is therefore of importance, since his doing so is essential to his own logical assaying of his decision. * * * Frustration of the purpose of the requirement occurs where, as too often happens, the judge uncritically adopts the findings drafted by the lawyer for the winning side".

Which of the District Court's Findings of Fact displayed "original thought or expression"?